8-27-2012

State v. Day Respondent's Brief Dckt. 39165

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39165
	)	
vs.	)	
	)	
KIM J. DAY,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

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STATEMENT OF THE CASE

Nature Of The Case

Kim J. Day appeals from the district court's order revoking his probation and executing his sentence for grand theft.

Statement Of Facts And Course Of Proceedings

In 2008, Day pled guilty to grand theft and was given a suspended fourteen-year sentence, with four years fixed, and placed on probation for ten years. (R., pp.20-26, 38-41.) Over two years later, the state filed a report of probation violation, alleging, *inter alia*, that Day had violated his probation by being convicted in Bingham County for lewd conduct. (R., pp.46-47.) After an evidentiary hearing, the district court found Day in violation of his probation based on his recent conviction for lewd conduct. (R., pp.64-65; 8/15/11 Tr., p.3, L.1 – p.10, L.10.) The court revoked Day's probation and imposed his original unified sentence of fourteen years, with four years fixed. (R., pp.66-69; 8/29/11 Tr., p.1, L.1 – p.4, L.9.) Day timely appealed. (R., pp.70-72.)

ISSUES

Day states the issues on appeal as:

1. Did the Idaho Supreme Court deny Mr. Day due process and equal protection when it denied his Motion to Augment with the requested transcript?

2. Did the district court abuse its discretion when it revoked Mr. Day's probation?

3. Did the district court abuse its discretion when it failed to reduce Mr. Day's sentence sua sponte upon revoking probation?

(Appellant's Brief, p.3.)

The state rephrases the issues on appeal as:

1. Has Day failed to establish that the Idaho Supreme Court violated his due process and equal protection rights by denying his motion to augment the appellate record with an irrelevant transcript?

2. Has Day failed to establish an abuse of the district court's sentencing discretion?

3. Has Day failed to establish that the district court abused its discretion when it failed, *sua sponte*, to reduce his sentence pursuant to Rule 35?

ARGUMENT

I.
Day Has Failed To Establish That The Idaho Supreme Court Violated His Constitutional Rights By Denying His Motion To Augment The Appellate Record With An Irrelevant Transcript

A. Introduction

After the appellate record was settled, Day filed a motion to augment with, *inter alia*, an as-yet unprepared transcript of his original sentencing hearing held on June 16, 2008. (Motion To Augment And To Suspend The Briefing Schedule And Statement In Support Thereof, filed December 21, 2011 (hereinafter "Motion").) The Idaho Supreme Court denied Day's motion insofar as it sought the preparation and inclusion in the appellate record of the June 16, 2008 sentencing transcript. (Order, filed January 17, 2012.)

Day now contends that, by denying his motion to augment the appellate record with the requested transcript, the Idaho Supreme Court has violated his constitutional rights to due process and equal protection and has effectively denied him effective assistance of counsel on appeal. (Appellant's Brief, pp.5-15.) Day has failed to establish a violation of his constitutional rights, however, because he has failed to show that the requested transcript is even relevant to, much less necessary for resolution of, the only issues over which this Court has jurisdiction on appeal.

B. Standard Of Review

The standard of appellate review applicable to constitutional issues is one of deference to factual findings, unless they are clearly erroneous, but free

review of whether constitutional requirements have been satisfied in light of the facts found. State v. Bromgard, 139 Idaho 375, 380, 79 P.3d 734, 739 (Ct. App. 2003); State v. Smith, 135 Idaho 712, 720, 23 P.3d 786, 794 (Ct. App. 2001).

C. Day Has Failed To Show Any Constitutional Entitlement To The Requested Augmentation

A defendant in a criminal case has a right to "a record on appeal that is sufficient for adequate appellate review of the errors alleged regarding the proceedings below." State v. Strand, 137 Idaho 457, 462, 50 P.3d 472, 477 (2002) (citing Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); Eskridge v. Washington State Bd. Of Prison Terms and Paroles, 357 U.S. 214 (1958); Griffin v. Illinois, 351 U.S. 12 (1956)). The state, however, "will not be required to expend its funds unnecessarily" to provide transcripts or other items that "will not be germane to consideration of the appeal." Draper, 372 U.S. at 495; see also M.L.B. v. S.L.J., 519 U.S. 102, 112 n.5 (1996) ("an indigent defendant is entitled only to those parts of the trial record that are germane to consideration of the appeal" (internal citations omitted)); Lane, 372 U.S. 477; Griffin, 351 U.S. 12. To demonstrate that the record is not sufficient, the defendant must show that any omissions from the record prejudiced his ability to pursue the appeal. State v. Polson, 92 Idaho 615, 620-21, 448 P.2d 229, 234-35 (1968) (distinguishing Martinez v. State, 92 Idaho 148, 438 P.2d 893 (1968)). See also United States v. Smith, 292 F.3d 90, 93 (1st Cir. 2002). To show prejudice, Day "must present something more than gross speculation that

the transcripts were requisite to a fair appeal." Scott v. Elo, 302 F.3d 598, 605 (6th Cir. 2002). Day has failed to carry this burden.

Day's appeal is timely only from the district court's August 30, 2011 Judgment and Commitment on Conviction of a Probation Violation revoking his probation and ordering his original sentence executed. (See R., pp.67-69.) He argues that the Idaho Supreme Court denied him due process and equal protection by denying his motion to augment the appellate record with an as-yet unprepared transcript of the June 16, 2008 sentencing hearing, but he has failed to adequately explain, much less demonstrate, how a transcript of a hearing held over three years before the decisions at issue in this case, and in relation to a completely unrelated set of probation violation allegations, is necessary to decide the only issues over which this Court has jurisdiction on this appeal.

Because the as-yet unprepared sentencing transcript was never presented to the district court in relation to the probation revocation proceedings at issue in this case, it was never part of the record before the district court and is not properly considered for the first time on appeal. See State v. Mitchell, 124 Idaho 374, 376 n.1, 859 P.2d 972, 974 n.1 (Ct. App. 1993) (in rendering a decision on the issues raised on appeal, the appellate court is "limited to review of the record made below" and "will not consider new evidence that was never before the trial court"); see also Huerta v. Huerta, 127 Idaho 77, 80, 896 P.2d 985, 988 (Ct. App. 1995) ("It is not the role of this Court to entertain new allegations of fact and consider new evidence."). Day, however, argues that "the requested transcript is relevant to the issues addressed at the probation violation

disposition hearing because the sentencing occurred before the probation violation disposition hearing, and the district court could rely on its memory of that hearing when it decided to revoke Mr. Day's probation." (Appellant's Brief, p.4.) Day further contends, citing State v. Hanington, 148 Idaho 26, 28, 218 P.3d 5, 8 (Ct. App. 2009), that "the June 16, 2008, sentencing hearing is relevant because Idaho appellate courts review all proceedings following sentencing when determining whether the court appropriately revoked probation." (Appellant's Brief, p.11.)

The state recognizes the Idaho Court of Appeals' statement in Hanington, 148 Idaho at 28, 218 P.3d at 8, that appellate "review [of] a sentence that is ordered into execution following a period of probation" is based "upon the facts existing when the sentence was imposed as well as events occurring between the original sentencing and the revocation of probation." Contrary to Day's assertions, however, Hanington does not stand for the proposition that a merits-based review of a decision to revoke probation and order a sentence executed requires preparation and inclusion in the appellate record of transcripts of every hearing over which the trial court presided. To the contrary, the law is well established that, absent a showing that evidence was presented at prior hearings *and* that the district court relied on such evidence in reaching its decision to revoke probation, an appellant is not entitled to transcription at public expense of every hearing conducted before the date probation was finally revoked.[1] Mayer

[1] In the recently decided (non-final, yet to be released for publication) decision by the Idaho Court of Appeals in State v. Morgan, --- P.3d ----, 2012 WL 2782599 *3 (Idaho App. 2012), relied upon here as instructive, the Court explained:

v. City of Chicago, 404 U.S. 189, 194 (1971) (state is not "required to expend its funds unnecessarily" where "part or all of the stenographic transcript ... will not be germane to consideration of the appeal" (citation and internal quotations omitted)); Draper, 372 U.S. at 496 ("[T]he fact that an appellant with funds may choose to waste his money by unnecessarily including in the record all of the transcripts does not mean that the State must waste its funds by providing what is unnecessary for adequate appellate review.").

Although there may be some circumstances that require inclusion in the appellate record of transcripts of prior hearings to fully review the revocation of probation, Day has failed to show that any such circumstances apply here. Day does not adequately explain how a transcript of the 2008 sentencing hearing is necessary to decide the only issues over which this Court has jurisdiction on this appeal. Indeed, there is no evidence that the district court had the as-yet unprepared transcript when it revoked Day's probation in August 2011, or that it relied upon anything said at the sentencing hearing as a basis for its decision to revoke Day's probation and order his sentence executed. Day's assertion in his

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> Morgan asserts that this Court's decision in *State v. Hanington*, 148 Idaho 26, 218 P.3d 5 (Ct. App. 2009), requires a review of the entire record of proceedings in the trial court up to and including the revocation of probation. Morgan reads *Hanington* too broadly. As stated in *Hanington*, in reviewing the propriety of a probation revocation, we will not arbitrarily confine ourselves to only those facts which arise after sentencing to the time of the revocation of probation. *Id.* at 28, 218 P.3d at 8. However, that does not mean that all proceedings in the trial court up to and including sentencing are germane. The focus of the inquiry is the conduct underlying the trial court's decision to revoke probation. Thus, this Court will consider the elements of the record before the trial court relevant to the revocation of probation issues which are properly made part of the record on appeal.

augmentation motion that the district court *may* have relied on its own recollection of the prior proceedings in deciding whether to revoke his probation (Motion, pp.3-4) is pure speculation and fails to show that the requested transcript is necessary to complete a record adequate for appellate review under the facts of this case. On appeal, Day similarly speculates that "the district court *could* rely on its memory of that hearing when it decided to revoke [his] probation." (Appellant's Brief, p.4 (emphasis added).)

Day has failed to point to anything in the record that would indicate that what happened at the June 16, 2008 sentencing hearing was considered or played any role in the court's decisions in August of 2011 to revoke Day's probation and order his original sentence executed. Accordingly, Day has failed to show that such transcript is necessary to complete an adequate record on this appeal.

Citing Mayer v. City of Chicago, 404 U.S. 189 (1971), Day claims that he is only required to make a "colorable argument" that he "needs items to complete a record on appeal" before the burden transfers to the state "to prove that the requested items are not necessary for the appeal." (Appellant's Brief, p.9.) He also argues, with no citation whatsoever, that "to meet the constitutional mandates of due process and equal protection," the state must provide him (and all indigent defendants) "with an appellate record unless some or all of the requested materials are unnecessary or frivolous." (Appellant's Brief, p.6; see also p.5 ("[T]he only way a court can constitutionally preclude an indigent defendant from obtaining that transcript is if the State can prove that the

transcript is irrelevant to the issues raised on appeal.").) No reading of Mayer supports these legal arguments.

Mayer was convicted on non-felony charges punishable only by a fine and he appealed, challenging the sufficiency of evidence and asserting a claim of prosecutorial misconduct. Id. at 190. The appellate court denied his request for a trial transcript at government expense on the basis of a local rule providing that verbatim transcripts of trial proceedings would be provided at government expense only for felonies. Id. at 191-93. The issue was not whether Mayer was entitled to a record of his trial, but whether he was entitled to a verbatim transcript of his trial. Id. at 193. The Court noted it had addressed a similar issue in Draper v. Washington, 372 U.S. 487 (1963), where the Court held that the government need not provide transcripts that were not "'germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances.'" Mayer, 404 U.S. at 194 (quoting Draper, 372 U.S. at 495-96). However, "the State must provide a full verbatim record where that is necessary to assure the indigent as effective an appeal as would be available to the defendant with resources to pay his own way." Id. at 195. "Moreover, where the grounds of appeal, as in this case, make out a colorable need for a complete transcript, the burden is on the State to show that only a portion of the transcript or an 'alternative' will suffice for an effective appeal on those grounds." Id.

Thus, if it is not clear on the existing record, an indigent appellant must establish that a record of certain "proceedings" is germane to the appeal. Id. at

194. Only after the germaneness of the requested record of the proceedings is established and a colorable need for a verbatim record is shown by the appellant will the burden shift to the state to demonstrate that a partial transcript or some record other than a verbatim transcript will be adequate. Id. at 194-95. See also Britt v. North Carolina, 404 U.S. 226, 227-28 (1971) (in deciding whether requested record necessary court should consider the "value of the transcript to the defendant in connection with the appeal," but standard does not require "a showing of need tailored to the facts of the particular case" and the court may take notice of the importance of a transcript).

Here the proceedings challenged on appeal are the revocation of Day's probation and the order that his original sentence be executed. The record related to the district court's decisions is already complete because all of the evidence considered by the district court at the revocation hearings is before the appellate court.[2] It is Day's appellate burden to establish that the requested transcript is necessary to create an adequate appellate record to review the orders revoking his probation and executing his original sentence. The augmentation he sought, however, was of a never before prepared transcript of a

[2] See, e.g., 8/1/11 Tr. (admit/deny hearing); 8/15/11 Tr. (evidentiary hearing); 8/29/11 Tr. (disposition hearing); R., pp.33-35 (minutes of 6/16/08 sentencing hearing); R., pp.38-41 (Judgment of Conviction Suspended and Order of Probation); R., pp.42-44 (Conditions of Probation); R., p.45 (Agreement of Supervision); R., pp.46-59 (Report of Probation Violation and attachments); R., pp.62-63 (minutes of 8/15/11 probation violation evidentiary hearing); R., pp.64-65 (Order and Decision); R., p.66 (minutes of 8/29/11 disposition hearing); R., pp.67-69 (Judgment and Commitment on Conviction of a Probation Violation); Clerk's Ex., PSI (with attachments); Clerk's Ex., Judgment/Order of Commitment, Bingham Co. No. CR-11-1046; Clerk's Ex., Psych. Eval., Bingham Co. No. CR-11-1046).

hearing held over three years before the district court rendered the decisions at issue in this case. Nothing in the record even suggests that the requested transcript (or anything contained therein) was before the district court in relation to the 2011 probation revocation proceedings. Because Day failed to make a showing of germaneness and colorable need for the requested transcripts, there is no burden on the state. Because all of the evidence before the district court is in the appellate record, that record is adequate for appellate review, and Day has failed to establish a violation of his due process rights.[3] Strand, 137 Idaho at 463, 50 P.3d at 478.

Day has also failed to establish that denial of his request to augment the record on appeal with an irrelevant transcript denied him equal protection. Day cites to several cases where criminal defendants were denied appellate records *because of their indigence*. (See Appellant's Brief, pp.6-10 (citing, e.g., Griffin v. Illinois, 351 U.S. 12 (1956); Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963)).) However, there is nothing in the record that in any way indicates that the Idaho Supreme Court denied Day's request for the transcript solely because he is indigent. In fact, Day's motion would have properly been denied even if he had the funds to pay for the transcript. The Idaho Appellate Rules require *any* party seeking augmentation to set forth a

[3] As a component of his due process claim, Day argues that the denial of his motion to augment the record with the requested transcripts has deprived him of effective assistance of counsel on appeal. (Appellant's Brief, pp.12-15.) Because, for the reasons already explained, Day has failed to show that the requested transcripts are necessary, or even relevant, for appellate review of the district court's order revoking his probation and executing his sentence, there is no possibility that the denial of the motion to augment has deprived Day of effective assistance of counsel on this appeal.

ground sufficient to justify the augmentation requested. I.A.R. 30. Day's motion to augment failed because he failed to meet this minimal burden, imposed upon all parties, of showing that the transcript was necessary or even helpful in addressing appellate issues. The Idaho Supreme Court's order properly denied the motion to augment because Day failed to make a showing that any appellant – indigent or otherwise – would be entitled to augment the record as requested. There is no reason to believe that the motion to augment would have been granted had Day been paying for the requested transcript; the rule applies to all parties, not just the indigent.

Day has failed to show that the denial of his motion to augment was in any way influenced or decided by his indigence, nor has he demonstrated that the requested transcript is necessary to complete a record adequate to review any issue over which this Court has jurisdiction on appeal. To the contrary, the record amply demonstrates that Day's motion to augment with the requested transcript was properly denied because he failed to show that the transcript was necessary for adequate review of the district court's decisions to revoke Day's probation and order his sentence executed. Because Day has failed to show his due process and equal protection rights were implicated, much less violated, by the denial of his motion to augment, he has failed to show any basis for relief.

II.

Day Has Failed To Establish That The District Court Abused Its Sentencing Discretion

A. Introduction

After finding that Day violated his probation because he was convicted on a recent charge of lewd conduct, the district court revoked Day's probation and ordered his sentence executed.[4] (R., pp.67-69.) On appeal, Day does not "contest the fact that he was convicted of lewd conduct." (Appellant's Brief, p.16.) Instead, Day argues that the district court "abused its discretion when it revoked [his] probation because it did so based on the erroneous assumption that it would have continuing jurisdiction and, therefore, the discretion to modify that order in the event [his] conviction for lewd conduct is overturned on appeal," and that the district court's order revoking probation was based "in part" on "its own misperception of the law." (Appellant's Brief, p.15.)

Contrary to Day's argument, the district court's decision to revoke his probation was based wholly upon the fact that he had recently been convicted of lewd conduct – not because the court believed it could reconsider its revocation order if his lewd conduct charge was overturned on appeal.

B. Standard Of Review

The decision to revoke probation is reviewed for an abuse of discretion. State v. Sanchez, 149 Idaho 102, 105, 233 P.3d 33, 36 (2009) (citing State v. Lafferty, 125 Idaho 378, 381, 870 P.2d 1337, 1340 (Ct. App. 1994)).

[4] On May 27, 2011, Day was found guilty by a Bingham County jury of lewd conduct, and was later sentenced to fifteen years (unified) with five years fixed. (Clerk's Ex.; Bingham Co. No. CR-2011-1046, Judgment/Order of Commitment.)

C. Day Has Failed To Establish That The District Court Abused Its Discretion By Revoking His Probation

A district court's decision to revoke probation will not be overturned on appeal absent a showing that the court abused its discretion. State v. Lafferty, 125 Idaho 378, 381, 870 P.2d 1337, 1340 (Ct. App. 1994). An abuse of discretion cannot be found if the district court's decision was consistent with applicable legal standards, and was reached by an exercise of reason. Id.

"The purpose of probation is rehabilitation." State v. Wilson, 127 Idaho 506, 510, 903 P.2d 95, 99 (Ct. App. 1995). "In deciding whether revocation of probation is the appropriate response to a violation, the court considers whether the probation is achieving the goal of rehabilitation and whether continued probation is consistent with protection of society." State v. Leach, 135 Idaho 525, 529, 20 P.3d 709, 713 (Ct. App. 2001). Any cause satisfactory to the court, which indicates that probation is not meeting its goals, is sufficient to justify revocation. Wilson, 127 Idaho at 510, 903 P.2d at 99. Contrary to Day's assertions on appeal, a review of the record shows that the district court revoked Day's probation solely because of he had recently been convicted of lewd conduct.

Day's recent conviction for lewd conduct not only served to violate his probation in a most profound way, it also constituted a sufficient basis for revoking his probation. During the dispositional hearing, and *before* the court made any comment about reconsidering its decision in the event Day's lewd conduct conviction is overturned, the court made the following comments:

[THE COURT]: Previously had [sic] an admission of a conviction in Bingham County for lewd and lascivious conduct. If I didn't then, I am taking the position that the conviction is binding on this Court. I think the defendant's collaterally stopped to deny that lewd and lascivious conduct occurred in view of the Bingham County conviction. So the Court does find a probation violation as to that charge. I think we talked about that at the last hearing. I did look at the judgment of conviction out of Bingham County as well as the psychosexual evaluation, and that was interesting reading in view of the conviction. So that's where I'm at.

. . . .

THE COURT: The single violation on the probation violation report related to lewd and lascivious conduct. And again, I do find a violation – probation violation there. As indicated by the State, the remaining allegations were withdrawn, so going [sic] forward with disposition.

All right. Mr. Day, anything else you'd like to say before I pronounce disposition on the probation violation?

THE DEFENDANT: No, Your Honor.

THE COURT: All right. Well, you raised an interesting question. In view of the psychosexual evaluation, I guess I can understand why there's an appeal going on in Bingham County. But having said that, I don't – I don't know that I can discount – I'm really not in a position to discount the conviction. I have to take the conviction at face value.

And based upon that conviction, that probation violation, obviously a very serious conviction, a very serious crime charged and then the conviction. So based upon that, I am revoking probation on this.

(8/29/11 Tr., p.1, L.7 – p.3, L.5 (emphasis added).) The concluding comments by the district court show that its decision to revoke Day's probation was based solely on the fact that Day was recently convicted of lewd conduct.

Although the district court went on to postulate that, if Day's lewd conduct conviction were overruled, there would be grounds to reconsider the revocation

of probation, the court concluded that Day's lewd conduct conviction and sentence gave it little choice but to revoke his probation, explaining:

> [B]ut as it stands right now, with the Bingham County conviction and also the sentence out of Bingham County, I don't think it makes sense for me to do anything other than revoke probation under the circumstances. So that's where I'm at.

(8/29/11 Tr., p.3, Ls.4-11.)

The record demonstrates that the district court did not base its decision to revoke Day's probation upon the notion that if his lewd conduct conviction were overturned, the court could reconsider its revocation order. That the court believed it could do so played no part in its determination that Day's lewd conduct conviction warranted revocation of his probation. Day has failed to show any abuse of discretion in the district court's decision to revoke his probation.

III.
Day Has Failed To Show That The District Court Abused Its Discretion When It Failed, *Sua Sponte*, To Reduce His Sentence Pursuant To Rule 35

A. Introduction

Day asserts that the district court abused its discretion when it failed, *sua sponte*, to reduce his sentence pursuant to Rule 35 upon revoking probation. (Appellant's Brief, p.19.) The record, however, supports the district court's decision to revoke probation and order the underlying sentence executed without reduction.

B. Standard Of Review

Upon revoking Day's probation, the district court had the authority, pursuant to Idaho Criminal Rule 35, to *sua sponte* reduce the underlying

sentence imposed upon his conviction for grand theft. I.C.R. 35; State v. McCarthy, 145 Idaho 397, 400, 179 P.3d 360, 363 (Ct. App. 2008). The decision of whether to do so was committed to the district court's discretion and, as such, Day bears the burden on appeal of establishing that the district court abused its discretion by not *sua sponte* reducing his sentence. Id.

C. Day Has Failed To Show That The District Court Abused Its Discretion When It Failed, *Sua Sponte*, To Reduce His Sentence Pursuant To Rule 35

Day asserts that the district court abused its discretion when it failed, *sua sponte*, to reduce his sentence pursuant to Idaho Criminal Rule 35. (Appellant's Brief, pp.19-21.) Day has failed to establish an abuse of discretion.

The state charged Day with grand theft for stealing money from his employer. (R., pp.15-16.) Pursuant to a binding Rule 11 plea agreement, Day pled guilty to that charge, and the parties entered into a stipulation requiring them to "jointly recommend" a sentence of "5 years determinate and 9 years indeterminate, for a total of 14 years, all to be suspended," with ten years of probation. (R., pp.20-23, 25-26.) The district court imposed a sentence of fourteen years with only four years determinate – less than the sentence agreed upon by both parties -- and placed Day on probation for ten years. (R., pp.73-75.) After Day was on probation for about three years, the district court revoked his probation because Day was convicted of lewd conduct in another county. (R., pp.64-69.)

Day asserts that the district court abused its discretion by failing to *sua sponte* reduce his sentence upon relinquishing jurisdiction in light of his mental

health, support from family and friends, work ethic and employment history. (Appellant's Brief, pp.19-21.) Additionally, he contends that his recent lewd conduct conviction "should not be afforded significant aggravating weight because is [sic] still pending on appeal and the conviction has been put into serious doubt by the psychosexual evaluation." (Appellant's Brief, p.21.)

There are two reasons why Day's argument fails. First, Day stipulated to receiving an even greater determinate sentence than he received and is therefore precluded by the invited error doctrine from challenging the sentence on appeal. Second, even if this Court reviews the merits of Day's claims, he has failed to establish an abuse of discretion.

A party is estopped under the doctrine of invited error from complaining that a ruling or action of the trial court that the party invited, consented to, or acquiesced in was error. State v. Carlson, 134 Idaho 389, 402, 3 P.3d 67, 80 (Ct. App. 2000). The purpose of the invited error doctrine is to prevent a party who "caused or played an important role in prompting a trial court" to take a particular action from "later challenging that decision on appeal." State v. Blake, 133 Idaho 237, 240, 985 P.2d 117, 120 (1999). This doctrine applies to sentencing decisions as well as to rulings during trial. State v. Leyva, 117 Idaho 462, 465, 788 P.2d 864, 867 (Ct. App. 1990).

Day stipulated to a unified sentence of fourteen years, with five years fixed, as part of the binding Rule 11 plea agreement. (R., pp.20-23, 25-26.) The district court accepted the agreement and imposed the same unified sentence, but with only four years determinate. (R., pp.73-75.) Because Day received

even a lesser determinate sentence than the one to which he agreed, he cannot claim on appeal that it is excessive or that the district court abused its discretion by declining to further reduce his sentence. Day's claim of an abuse of sentencing discretion is barred by the doctrine of invited error.

Even if this Court considers the merits of Day's claim, he has still failed to establish an abuse of discretion. Upon revoking a defendant's probation, a court may order the original sentence executed or reduce the sentence as authorized by Idaho Criminal Rule 35. Hanington, 148 Idaho at 27, 218 P.3d at 7, (citing State v. Beckett, 122 Idaho 324, 326, 834 P.2d 326, 328 (Ct. App. 1992); State v. Marks, 116 Idaho 976, 977, 783 P.2d 315, 316 (Ct. App. 1989)). A court's decision not to reduce a sentence is reviewed for an abuse of discretion subject to the well-established standards governing whether a sentence is excessive. Hanington, 148 Idaho at 27, 218 P.3d at 7. Those standards require an appellant to "establish that, under any reasonable view of the facts, the sentence was excessive considering the objectives of criminal punishment." State v. Stover, 140 Idaho 927, 933, 104 P.3d 969, 975 (2005). Those objectives are: "(1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrong doing." State v. Wolfe, 99 Idaho 382, 384, 582, P.2d 728, 730 (1978). The reviewing court "will examine the entire record encompassing events before and after the original judgment," i.e., "facts existing when the sentence was imposed as well as events occurring between the original sentencing and the revocation of probation." Hanington, 148 Idaho at 28, 218 P.3d at 8.

Day pled guilty to grand theft for embezzling money from his employer, the Farr Candy Company, from June, 2005 through July, 2007, which amounted to over $40,000. (R., pp.15-16, 20-23, 36-37.) Although Day was placed on probation in June of 2008, he was convicted of lewd conduct for fondling his step-daughter's genital area while the two were in a hot tub, which conduct began in 2007 and ended during the winter of 2008 – while he was on probation in the current case. (Clerk's Ex., Psych. Eval., Bingham Co. No. CR-11-1046, pp.1-2.) Despite Day's contention that his Bingham County lewd conduct "conviction has been put into serious doubt by the psychosexual evaluation"[5] (Appellant's Brief, p.21), the fact remains that he stands convicted of that extremely serious crime.

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[5] Although the psychological evaluator concluded Day was a "*low* risk of sexual offending in the future but at moderate risk of more general criminal recidivism" (Clerk's Ex., Psych. Eval., Bingham Co. No. CR-11-1046, p.12 (emphasis added)), he based that assessment on being uncertain whether Day actually was guilty of lewd conduct. (See id., p.14 ("If Mr. Day is indeed culpable of the sex crime for which he was convicted in jury trial earlier this year . . ..").) The evaluator earlier stated that, assuming Day was culpable for lewd conduct, he would be a moderate recidivism risk as both a general offender and a sex offender, explaining:

> Risk factors in Mr. Day's case for general criminal recidivism include his clear history of impulsivity, poor problem solving skills, and inability to maintain himself on community supervision without engaging in a new crime. Additional factors include some negative emotionality as reflected in his current state of depression, and his apparent use of sexuality as a coping tool for managing unpleasant emotions. His history of three Grand Theft convictions suggests a lack of concern for others as well. Finally, Mr. Day's risk of general criminal recidivism is increased by his subpar capacity for stability in romantic relationships. *I note that, while I speak of the foregoing stable characteristics as resulting in moderate risk of general criminal recidivism, this rating of moderate risk would also apply to sex offender recidivism risk were Mr. Day indeed culpable of the index sex crime.*

The district court's decision not to further reduce Day's sentence upon revoking his probation was appropriate in light of the seriousness of his grand theft offense, his criminal history of two prior convictions for grand theft (Clerk's Ex., PSI, p.3), his ongoing disregard for the law as evidenced by his recent lewd conduct conviction (as a persistent violator) (Clerk's Ex., Judgment/Order of Commitment, Bingham Co. No. CR-11-1046), and the risk he continues to present to the community (see n. 4, supra).

Day was given ample opportunity to prove that he could succeed on probation. In review of the entire record, the district court's decision to revoke Day's probation was reasonable in light of the nature of his underlying offense, his criminal history, his recent lewd conduct conviction, and an unwillingness to abide by the conditions of probation. Considering all those factors, Day was not entitled to have the district court *sua sponte* reduce his sentence. Given any reasonable view of the facts, Day has failed to establish an abuse of sentencing discretion.

CONCLUSION

The state respectfully requests that this Court affirm the district court's orders revoking Day's probation and executing his sentence.

DATED this 27th day of August, 2012.

JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 27th day of August, 2012, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SHAWN F. WILKERSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

John C. McKinney
Deputy Attorney General

JCM/pm